

COMPLIANCE BOARD OPINION NO. 95-5

October 18, 1995

Mr. Len Lazarick

The Open Meetings Compliance Board has considered your complaint dated July 28, 1995, regarding a series of closed meetings of the Board of Education of Baltimore County (hereafter, "School Board").

In your complaint, you express the belief "that the school board has repeatedly been in violation of the Open Meetings Law by holding unannounced and undocumented meetings of the board to both evaluate current Superintendent Stuart Berger and to discuss his replacement." You acknowledge "that the discussions of the superintendent and his replacement could have been held in a legally closed meeting, if the board had so announced and so voted. But the board neither announced such meetings nor held a vote to close such meetings. We suspect also that there are no minutes for these meetings. We believe this all violates the law."

In a timely response on behalf of the School Board, Assistant County Attorney J. Robert Haines asserts that the Open Meetings Act was not applicable to the series of events involving former Superintendent Berger and his replacement. Mr. Haines' letter describes three sets of events: the School Board's evaluation of Dr. Berger and negotiation over the terms of his resignation, all of which occurred prior to July 11, 1995; a closed session on July 11, at which the School Board affirmed Dr. Berger's resignation and approved in principle the change in his function to consultant; and discussions about the appointment of an interim Superintendent, culminating in an announcement at an open session on August 8 of the contract amendments reflecting Dr. Berger's departure, which were formally approved at that meeting, and the naming of an interim Superintendent.

With respect to the first group of events, Mr. Haines indicates that both the evaluation process and the negotiations were conducted by members of the Board constituting less than a quorum. The Act did not apply to these gatherings, because only "meetings" are covered by the Act, and a "meeting" does not take place without a quorum of the public body. §10-502(g) of the State Government Article, Maryland Code; Compliance Board Opinion 94-8 (October 26, 1994).

The School Board's consideration of the results of the negotiation at its July 11 closed session concededly constituted a "meeting," because a quorum of the Board was present. However, Mr. Haines contends that this discussion constituted an "executive function" excluded from the Act under §10-503(a)(1)(i).

No provision of the Act is more troublesome than the "executive function" exclusion. The Compliance Board has wrestled with it on a half-dozen prior occasions, and the Attorney General considered its amorphous boundaries in a lengthy opinion. *See* Compliance Board Opinions 92-2, 92-3, 92-4, 93-2, 93-4, 94-7, and 95-2; 78 *Opinions of the Attorney General* ____ (1993) [Opinion No. 93-028 (July 28, 1993)]. The term is defined in §10-502(d)(1) as "the administration of" any State or local law or any public body's rule, regulation, or bylaw. The term is then described in 10-502(d)(2) by what it does not encompass: "Executive function" does not include any advisory, judicial, legislative, quasi-judicial, or quasi-legislative function.

The Compliance Board applies a two-step analysis to the "executive function" problem, aptly summarized by the Attorney General in his *Open Meetings Act Manual*. First, we consider "whether the matter ... falls within the definition of any of the other defined functions. If so, then the 'executive function' exclusion is ruled out.... If not, [we] must consider whether the matter ... involves the development of new policy, or merely the application of an already established law or policy. The 'executive function' exclusion covers only the latter." Office of the Maryland Attorney General, *Open Meetings Act Manual* 10 (2d ed. 1995).

The School Board's evaluation of Dr. Berger does not fall within the definition of any of the other functions defined in §10-502. It is not an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function. Rather, the discussion squarely involves "the administration of ... a law of the State" — namely, §4-201 of the Education Article, Maryland Code, which imposes on the School Board the responsibility to appoint a County Superintendent and gives the School Board the power to remove the Superintendent for certain specified grounds, including "incompetency" and "willful neglect of duty." Implicit in these provisions is the duty of the School Board to evaluate the performance of the Superintendent.

Although the School Board's *evaluation* of Dr. Berger fell within the executive function exclusion, the Compliance Board cannot reach the same conclusion about the School Board's discussion of his new role as consultant. This is so because the definition of "quasi-legislative function" includes "the process or act of ... amending a contract." §10-502(j)(3). That is precisely

what the School Board did when it amended Dr. Berger's contract to change his duties. Because the entire process related to this contract amendment comes within the definition of "quasi-legislative function," no part of that process is an executive function. Hence, any discussion on July 11 about the amendment of Dr. Berger's contract was subject to the Act.

Yet the School Board's discussion of the contract amendment was permissibly done in closed session. A discussion about a particular employee's reassignment is within the "personnel matter" exemption in §10-508(a)(1). Moreover, the School Board's minutes for its July 11 meeting indicate that the Board properly invoked this exception to close its discussion. The minutes also disclose an "amendment to the Superintendent's contract ... which was approved by unanimous vote." It appears to the Compliance Board that the School Board complied with its procedural obligations under §10-508(d) and 10-509(c), relating to the procedures for closing a session and the content of minutes.

Turning to the third phase of the School Board's process, determining who would be named as Acting Superintendent, the Compliance Board views these discussions as encompassed by the executive function exclusion. To be sure, the definition of "legislative function" includes "approving or disapproving an appointment." §10-502(f)(2). Nevertheless, the Compliance Board believes that this phrase does not refer to the process by which a public body itself makes an appointment. The terms "approving or disapproving" denote a response to someone else's proposal of an appointment. For example, the standard legal dictionary defines "approve" to mean "to confirm, notify, sanction, or consent to some act or thing done by another." *Black's Law Dictionary* 102 (6th ed. 1990).

One of the traditional functions of a legislative body is to confirm or reject an appointment made by an executive authority. Presumably, the General Assembly had this function in mind when it included "approving or disapproving an appointment" within the "legislative function." The phrase "approving or disapproving" can also comfortably encompass a supervisory board's decision whether to concur with a proposed appointment to be made by a subordinate. However, when the School Board considered whom *it* might wish to name as interim Superintendent, it was *making* an appointment, not "approving" one. Further, it was carrying out its responsibility under §4-201 of the Education Article. Therefore, it was administering a law and so engaged in an "executive function."

For these reasons, the Compliance Board is of the opinion that the Open Meetings Act was not violated with respect to the matters touched on in your complaint.

In your letter, you observe that if the sequence of events concerning Dr. Berger is found to fall within the executive function exclusion, "then the Open Meetings Law is effectively gutted in a serious way." To a large extent, as discussed above, the Compliance Board has made such a finding about the executive function. The Compliance Board recognizes that the executive function exclusion does indeed sometimes lead to results that are seemingly inconsistent with the basic legislative policy of the Act — that "public business be performed in an open and public manner." §10-501(a)(1). Indeed, the Compliance Board has highlighted this issue for the General Assembly in its annual reports. Yet the exclusion remains in the law, presumably because the General Assembly has accepted the argument the goal of public awareness is not an absolute one, and that the exclusion promotes effective decision-making under often difficult circumstances.

For these reasons, the Compliance Board finds no violation of the Act.

OPEN MEETING COMPLIANCE BOARD

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* Chairman Walter Sondheim, Jr. did not participate in the preparation or issuance of this opinion.